INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Argument	8
Conclusion	11

CITATIONS

Cases:

Chen v. *Foley*, 385 F. 2d 929 certiorari denied, 393 U.S. 838	9
Jay v. *Boyd*, 351 U.S. 345	9
Miranda v. *Arizona*, 384 U.S. 436	10
Santos v. *Immigration and Naturalization Service*, 375 F. 2d 262	9
United States ex rel. Brzovich v. *Holton*, 222 F. 2d 840	11

Statutes and regulation:

8 U.S.C. 1101	2
8 U.S.C. 1153 (Supp. III, 1965-67)	5
8 U.S.C. 1182(a)	8
8 U.S.C. 1251	2
8 U.S.C. 1252(b)	8
8 U.S.C. 1252(g)	8
8 U.S.C. 1254	8
8 U.S.C. 1255	2, 5, 7, 9
8 C.F.R. 244.1	8

Miscellaneous:

Visa Bulletin No. 171, Dept. of State, April 17, 1967	8

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1188

NORMA C. DIRIC, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-15 to A-21) is reported at 400 F. 2d 658.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 1968. A petition for rehearing was denied on October 30, 1968. Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to March 28, 1969, and on March 22, 1969,

the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner, whose deportability is not contested, received a fair hearing on her application for adjustment of status or for voluntary departure.

STATUTES INVOLVED

Section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2), provides:

> Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—
>
> * * * *
>
> (2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or in violation of any other law of the United States;
>
> * * * *

Section 101(a)(15) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15), provides in pertinent part:

> The term "immigrant" means every alien except an alien who is within one of the following classes of nonimmigrant aliens—
>
> * * * *
>
> (F)(i) an alien having a residence in a foreign country which he has no intention of abandoning, who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for

> the purpose of pursuing such a course of study at an established institution of learning or other recognized place of study in the United States, particularly designed by him and approved by the Attorney General after consultation with the Office of Education of the United States, which institution or place of study shall have agreed to report to the Attorney General the termination of attendance of each nonimmigrant student, and if any such institution of learning or place of study fails to make reports promptly the approval shall be withdrawn, and (ii) the alien spouse and minor children of any such alien if accompanying him or following to join him;

Section 245(a) of the Immigration and Nationality Act, 8 U.S.C. 1255(a), provides:

> The status of an alien, other than an alien crewman, who was inspected and admitted or paroled into the United States may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is approved.

STATEMENT

1. On June 24, 1965, petitioner, a native and citizen of the Republic of the Philippines, entered the United States at Anchorage, Alaska, as a non-immigrant student (R. 35-36, 85, 87-88). The period for

which she was originally admitted was subsequently extended to June 15, 1966, to permit her to obtain practical training (R. 92, 95). On October 11, 1966, she was ordered to show cause why, in view of her overstay, she should not be deported (R. 85).

At a hearing before a special inquiry officer on October 20, 1966, petitioner was advised of her right to be represented by counsel, see 8 U.S.C. 1252(b)(2), but she responded that she did not wish to retain counsel (R. 33). It was shown that petitioner, who had become a medical nurse in the Philippines after sixteen years of schooling (R. 53; Pet. App. A-7), was permitted to enter the United States in order to attend the Seattle Dental Assistants and Technicians School. She completed this course on December 17, 1965 (R. 89-90). On March 21, 1966, she was admitted to the St. Joseph's Hospital School of Nursing, at Tacoma, Washington, to study psychiatric nursing (R. 93-98). On June 2, 1966, she applied for practical training in nursing in order to take the Washington state board and to remain in this country if the "Doctor's Association" was interested in keeping her (R. 98). Petitioner testified that she was unable to find employment with any dentist after she had completed her dental technician course (R. 52). On June 19, 1966, she started working for the South Park Nursing Home. Petitioner stated that the manager of the home had talked with Mr. Hutchins of the Immigration and Naturalization Service and obtained verbal permission for her to do this (R. 42). Petitioner said she had remained beyond her extended departure date of June 15, 1966, with the verbal per-

mission of Mr. Hutchins (R. 34-38). Hutchins testified that the question of petitioner's continued presence and employment in this country had arisen only in the course of a discussion of a possible application for adjustment of status under Section 245(a), 8 U.S.C. 1255(a).[1]

At that point, petitioner formally sought, for the first time, to apply for a change of status to permanent resident (R. 54). Although the trial attorney objected that this would be futile, since the quota for the Philippines was already oversubscribed, the hearing was adjourned to permit petitioner to make this application (R. 54-56).

2. On December 12, 1966, the hearing was resumed, and the special inquiry officer noted that petitioner had submitted an application for adjustment of status to that of a permanent resident, claiming preference as a trained nurse (R. 58-59). The trial attorney then sought to inquire into petitioner's qualification as a person of good moral character. It appeared from petitioner's answers and from letters

---

[1] Hutchins testified that petitioner came to the office and presented a document from the St. Joseph's Hospital in Tacoma indicating that she should have practical training. On this, official action was withheld to permit petitioner to apply for a third-preference immigrant visa under Section 203(a)(3) of the Act, 8 U.S.C. 1153(a)(3) (Supp. III, 1965-67) (R. 49). He told petitioner that he would recommend denial of her application; she had never taken the practical training for which she had applied in connection with her dental course, and Hutchins advised her that psychiatric nursing would not qualify as a practical training project related to the dental courses which she had entered the United States to take. Petitioner never presented an application to extend her stay past June 15, 1966 (R. 50).

written by her father and by the aunt who had sponsored her entry and with whom she had lived for a while after arriving here, that arrangements had been made for petitioner to come to this country to get her away from a married man with whom she had been associating, an association that culminated in a criminal abortion shortly before she left. Her aunt and sponsor subsequently complained to immigration authorities that she no longer wanted anything to do with petitioner because she had become emotionally involved with the manager of the nursing home where she worked, also a married man (R. 64-75, 106-108). The trial attorney said that he was informed that the aunt had pneumonia, but that arrangements would be made for her presence if petitioner desired "to be confronted" with her aunt and uncle. Petitioner responded that "I don't want to see them anymore" (R. 79). The special inquiry officer, too, said that he did not desire to question the aunt (R. 81).

3. The special inquiry officer found that petitioner had undeniably overstayed the period for which she had been admitted to the United States and thus was deportable. He also determined that her application for adjustment of status had to be denied because she could not meet the initial requirement of the law as to availability of an immigrant visa, inasmuch as the third preference of the Philippine quota had already been exhausted. He added, further, that he would in any event have denied the application as a matter of discretion on the ground that petitioner was not a

bona fide non-immigrant at the time of her admission.[2] The privilege of voluntary departure was denied because of petitioner's failure to meet her burden of showing that she was a person of good moral character. Petitioner was ordered deported (Pet. App. A-5 to A-8).

3. Petitioner did not appeal from the deportation order within the statutory period. On January 13, 1967, however, petitioner moved through counsel to reopen the proceedings. She alleged that her waiver of counsel at the original hearing was not effective and that the record did not support the finding that she was not a bona fide non-immigrant at the time of her admission (Pet. App. A-10 to A-11). An affidavit of Dr. Keith Shaw as to petitioner's good moral character was submitted (R. 19-20). The special inquiry officer denied the motion, stating that it failed to show that the evidence was not available at the former hearing. He noted further that petitioner was unable to meet the statutory requirements for adjustment of status under Section 245 because she was not eligible for a third-preference visa at the time her application was considered (Pet. App. A-13 to A-14). The Board of Immigration Appeals dismissed an appeal from that order, concluding that petitioner had knowingly declined to exercise her right to counsel, and that she had failed to sustain her burden of establishing good

---

[2] Although she had completed sixteen years of education in the Philippines and was qualified as a medical nurse, she had obtained her visa in the guise of a student dental technician. After she had completed her course she failed to take the practical training but went to work as a nurse with the intention of remaining in the United States permanently.

moral character. Citing Visa Bulletin No. 171, dated April 17, 1967, the Board also observed that the Philippine quota had been entirely allocated for the fiscal year, so that no purpose would be served in reopening the proceeding (Pet. App. A-9 to A-11).

4. The court of appeals affirmed. Both the opinion of the court and the concurring opinion of Judge Ely criticized the trial attorney for the procedure followed in challenging petitioner's character. But in view of the fact that petitioner was unable to qualify for an adjustment of status because the Philippine quota was oversubscribed, so that no immigrant visa was immediately available at the time of the application, the court found no prejudice (Pet. App. A-15-A-21).

ARGUMENT

1. The court below properly concluded that any impropriety in the administrative hearing did not affect petitioner's rights. She does not deny that she overstayed the period for which she had been temporarily admitted to this country as a non-immigrant student. It was this expiration of time allotted for her visit which formed the basis for the finding of deportability, not her involvement in immoral conduct.[3]

---

[3] Petitioner raises, but does not argue, the question whether she was improperly denied voluntary departure (Pet. 2). Petitioner applied for the privilege of voluntary departure at her own expense, see 8 U.S.C. 1254(e), a form of relief that has different consequences from voluntary removal at government expense, see 8 U.S.C. 1252(b) and (g), 1182(a)(17). The regulations therefore appropriately provide that the type of voluntary departure petitioner sought will not be

Nor was the denial of her application for adjustment of status premised on the information developed about her conduct before and after entering this country. Section 245 of the Immigration and Nationality Act (8 U.S.C. 1255) is explicit in establishing as one prerequisite to adjustment of status, that an immigrant visa must be immediately available at the time the application is approved. The record in this case shows, however, that at the time of the application for adjustment, a visa was not available because the third-preference Philippine quota claimed by petitioner had been completely exhausted (Pet. App. A-7, A-11). Under these circumstances, as the Board of Immigration Appeals and the court of appeals concluded (Pet. App. A-11 to A-12, A-20) no purpose could have been served by reopening the case to inquire further into petitioner's moral character.[4]

---

granted unless the alien can show he is financially able to carry through on his offer to leave voluntarily. 8 C.F.R. 244.1. Petitioner testified that she did not have such means (R. 53-54), and therefore her ineligibility for this form of discretionary relief did not turn critically on her moral character (see Pet. App. A-19).

[4] The possibly objectionable questioning of petitioner by government counsel was concerned with an *additional* factor relevant to adjustment of status: whether petitioner was the type of person to whom discretionary relief should be granted. It is well settled that petitioner, as the moving party, bore the burden of affirmatively demonstrating not only that such relief was statutorily available but also that it *should*, as a matter of discretion, be extended. *E.g.*, *Santos* v. *Immigration and Naturalization Service*, 375 F. 2d 262 (C.A. 9); *Chen* v. *Foley*, 385 F. 2d 929 (C.A. 6), certiorari denied, 393 U.S. 838; cf. *Jay* v. *Boyd*, 351 U.S. 345. In addition to the failure to satisfy this burden and to meet the statutory require-

2. The same point may appropriately be made in response to petitioner's claim that she was prejudiced by the absence of counsel: the services of a lawyer at the hearing could not have affected the statistical fact that there were simply more prior applicants for visas than allowed by the quota.[5] But in any event, petitioner was advised of her statutory right to appear with counsel, and chose not to do so.

Petitioner's reliance upon *Miranda* v. *Arizona*, 384 U.S. 436, is misplaced. That decision implements the privilege against self-incrimination by requiring the exclusion from a *criminal* trial of incriminatory statements obtained from a suspect who is "in custody" and who has not received full warnings of his right to remain silent and to have counsel. But as the court below held (Pet. App. A-20 to A-21), the constitutional premise for *Miranda* does not extend to the asking of relevant questions in a deportation hearing, especially on issues on which the alien bears the burden of proof.

3. None of the cases on which petitioner relies (Pet. 5-7) reveal any inter-circuit conflict on a question of law. None of the cases involves facts or issues similar to those presented in the present case. For example, in the only case from outside the Ninth Circuit, where

---

ment of immediate availability of a visa, petitioner failed to meet still another test, since, as the special inquiry officer ruled, the objective evidence independently demonstrated that she was not a bona fide nonimmigrant at the time of her admission (Pet. App. A-7).

[5] Similarly, the presence of counsel could not have *improved* petitioner's financial situation so as to have made her a practical candidate for voluntary departure, see n. 3, p. 8, *supra*.

this case arose, the court of appeals merely ruled that the Board of Immigration Appeals erred in reversing the factual finding of a special inquiry officer, supported by substantial evidence, that the government had not proved the alien was a member of the communist party. It was in that context that the court observed, accepting the finding made by the special inquiry officer, that isolated hearsay was not sufficient to prove the critical element of deportability in that case. *United States ex rel. Brzovich* v. *Holton*, 222 F. 2d 840 (C.A. 7). In the instant case, petitioner does not deny deportability, and her application for discretionary relief was properly denied on grounds unrelated to the arguably improper questioning about the hearsay statements of others.

CONCLUSION

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.